And yet while the judiciary exercises functions that require judgments such as those required of the legislature, the result, in that it causes a commingling of supposedly distinct powers, has not been fraught with the disaster that philosophers of the eighteenth century feared. That there could be no liberty if any two functions of government were combined in one body was the view of MONTESQUIEU. The courts can exercise no "arbitrary control" over the individual as matters now stand, for their power does not extend to the enactment of laws, but only to their defeat. There is, however, the danger always imminent, that highly beneficial social legislation be in effect nullified by the inadequate social philosophy of the justices.

The matter of the social philosophy is all-important. While it may be conceded that the conservatism of the courts has at times been fortunate, yet there can be little question that the extremely individualistic doctrines manifested in some of the decisions, even late ones, are entirely insufficient to cope with existing economic conditions. Perhaps the courts should be criticised for clinging to the doctrines of a by-gone day.

But therein the courts reflect the omission of our entire present-day society. True, social theories in great number are being expounded, but their defect is a devotion to a too narrow set of interests. Americans are a nation of particularists. Their vision comprehends little of the past, little of the future, and only fragments of the present. A broad philosophy, touched with a universal spirit, is lacking. Ideals are in confusion, revered institutions are disintegrating, it is a period of great crisis. The need is for the thinker to construct, from the experiences of the nation, a view and an ideal adequate to modern society. In accomplishing this task the judiciary, including as it does much of the strongest intellect, will no doubt do its part. But a clear realization of the work to be done is important as the first step.

W. W. S.

LOSS THROUGH GROSS NEGLIGENCE OF CARRIER AS CONVERSION. — When goods are carried by a common carrier under a limited liability contract, and the carrier has converted the goods, can it set up the contract value as the maximum amount that the shipper is entitled to recover in an action for conversion of the goods? Will the carrier be deemed to have converted the goods if they are lost through his gross negligence?

In *Nashville, C. & St. L. Ry.* v. *Truitt Co.*, 86 S. E. 421, twenty-eight mules were shipped by plaintiff under a contract limiting liability to $100 per head in consideration of the reduced freight rate. When the goods arrived at the destination, it was found that in some unexplained manner, three mules of inferior kind had been substituted for three of those originally shipped. The Georgia Court of Appeals *held,* that the substitution being unexplained by the carrier, a presumption that the goods were lost through the *gross negligence* of the carrier arises, which will be sufficient to support an action for conversion against the carrier; and that the amount of the shipper's recovery will not be limited to the contract valuation, but that he may recover the full amount of his loss.

While it is universally held that a carrier cannot contract for exemption from liability for his own negligence, the CARMACK AMENDMENT has been construed by a long line of cases, to permit the carrier and shipper to enter into a contract fixing the amount of the carrier's liability in case of loss, through negligence or otherwise, where the freight rates charged are based upon the shipping value of the goods. *Adams Express Co.* v. *Croninger,* 226 U. S. 491; *Kansas City R. R. Co.* v. *Carl,* 227 U. S. 639; *Pierce Co.* v. *Wells Fargo,* 236 U. S. 278.

But the carrier's contract limiting liability to a specified amount has no application to damages to be recovered where the carrier has converted the goods. By the act of conversion, he will be deemed to have thereby abandoned his contract of carriage, and he will be liable for their true value, not upon contract, but in tort for conversion. It would be contrary to public policy to permit a carrier to whose care goods have been entrusted, to convert the goods, and then lessen the measure of his own liability by invoking an agreed valuation, made merely for the purpose of reducing freight rates. 1 HUTCHINSON, CARRIERS, (3rd Ed.) 435. That he cannot set up the contract value in such a case, has been decided in a number of cases. *Central Ga. Ry. Co.* v. *Chi. Portrait Co.,* 122 Ga. 11; *Rosenthal* v. *Weir,* 170 N. Y. 148; *St. Louis, etc. Ry.* v. *Wallace* (Tex.), 176 S. W. 764; *Adams Express Co.* v. *Berry,* 35 App. D. C. 208; *Savannah, Fla. & W. Ry.* v. *Sloat,* 93 Ga. 803.

It is definitely settled that if there has been a conversion by the carrier, the contract is abandoned and the shipper may recover in trover for the full value of the goods in spite of his contract. But the question arises, what acts of the carrier will be deemed to amount to a conversion? According to COOLEY, TORTS, 448, "Any distinctive act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion." Acts constituting a conversion have been held to be: a sale of goods within less than six months (as per statute) as unclaimed freight, *Central Ga. Ry. Co.* v. *Chicago Portrait Co.,* supra; a delivery to buyer after notice of stoppage in transitu, *Rosenthal* v. *Weir,* supra; a delivery to a wrong place, *St. Louis Ry. Co.* v. *Wallace,* supra; embezzlement by carrier's agents, *Adams Express Co.* v. *Berry,* supra; where delivery is wrongfully withheld, *Ry. Co.* v. *O'Donnell,* 49 Ohio State 489; a delivery to the wrong person, *Ga. F. & A. Ry.* v. *Milling Co.,* 82 S. E. (Ga.) 784; a deviation from the prescribed route, *McKahan* v. *Am. Express Co.,* 95 N. E. (Mass.) 785; a departure from the method of transportation agreed upon,—by steamship instead of rail,—*Merrick* v. *Webster,* 3 Mich. 268. In *Stewart* v. *Merchants Despatch Transportation Co.,* 45 Ia. 470, the goods were shipped to be carried through in the same car, but were unloaded and put into a warehouse during transit and there burned. *Held,* to be a conversion through the contract exempted the carrier from loss by fire.

It will be observed that in all these cases, the act constituting the conversion was a *positive act,*—a misfeasance or malfeasance. It was a "distinct act of dominion" wrongfully asserted in derogation of the owner's title. The

main thing to be observed is that it was some *act* of the shipper that constituted the conversion.

Can the non-feasance of the carrier, even though it may amount to gross negligence, constitute a conversion, as held by the court in the principal case?

Central Ry. & Banking Co. v. *Lampley*, 76 Ala. 357, was an action of trover for the conversion of a registered letter, either lost or stolen through the negligence of the carrier. It was held that there was no conversion. The court said, "Trover will lie only when the defendant is guilty of conversion, which implies a wrongful disposition, appropriation, wasting or withholding of the property. The essential element is *malfeasance*. The action will lie against a common carrier for a misdelivery, or an appropriation of the property to his own use, or for any act of dominion or ownership antagonistic to and inconsistent with the plaintiff's claim or right. But trover will not lie against a carrier for goods lost by accident or stolen, * * * nor for any act or omission which amounts to negligence merely, and not to an actual wrong." In *Wamsley* v. *Atlas S. Co.*, 168 N. Y. 533, it was said that the general rule is that a common carrier is not liable in conversion for *nonfeasance*, although it may be liable in case for negligence. In *Magnin* v. *Dinsmore*, 90 N. Y. 70, the court said, "A conversion implies a wrongful *act*, a misdelivery, a wrongful disposition, or withholding of the property. A mere non-delivery will not constitute a conversion, if the goods have been lost through negligence, or have been stolen. * * * All the cases recognize the distinction between mere negligence in the performance of a duty from which the loss ensues, and acts of misfeasance * * *."

Bowlin v. *Nye*, 10 Cush. 416, was an action of trover for the value of a bale of cloth. The bale had been placed on board defendant's vessel and never delivered. There was no evidence as to how it was lost, or whether it was stolen. METCALF, J., said, that conversion, when applied to the action of trover, imports an unlawful *act*, and not a mere *nonfeasance*, and that if the nonfeasance of the defendant was the cause of the loss, the plaintiff's remedy is an action in case for negligence, and not in trover for conversion.

In *Packard* v. *Getman*, 4 Wend. 613, a box of goods disappeared from defendant's wharf under circumstances showing negligence in the carrier. It was held that the negligence was a non-feasance, and trover would not lie for nonfeasance.

Taugher v. *N. P. Ry. Co.*, 21 N. D. 111, seems to be directly opposed to the *Truitt* case. It was there held that the burden of proving conversion in an action against a carrier is upon the plaintiff. It was accordingly held that conversion was not shown where the property at the time of the demand had disappeared from the car, and no explanation was given of its loss, although in an action on the contract for failure to deliver, the burden of explaining the loss would have been upon the carrier.

The authorities are numerous which hold that to support an action of conversion against a carrier, the act of the carrier which causes the loss of the goods must be some *positive act*,—a misfeasance or malfeasance,—and not merely a nonfeasance,—the negligence of the carrier. No distinction is made between the degrees of negligence,—slight, ordinary or gross,—in an

action for conversion. The authorities seem to hold that a nonfeasance, though it may amount to gross negligence, will not support the action for conversion. *Hawkins* v. *Hoffman,* 6 Hill 586; *Bromley* v. *Coxwell,* 2 B. & P. 438; *Biggs* v. *N. Y. etc. Ry. Co.,* 28 Barb. 515; *Bailey* v. *Moulthrop,* 55 Vt. 13; *Bolling* v. *Kirby & Bro.,* 90 Ala. 215; *Nutt* v. *Wheeler,* 30 Vt. 437.

This *Truitt* case stretches the doctrine of conversion a little too far when it places the burden of disproving conversion upon the carrier, and holds that in case of unexplained loss or substitution, a case of gross negligence is made out which will support the action for conversion; and that the shipper may thereby ignore the valuation he has contracted for, and recover the full amount of his loss.

There is no intimation in any of the leading cases which have construed the CARMACK AMENDMENT that the amount to be recovered in case of loss, depends upon the manner in which the loss has occurred. There is nothing to indicate that if the goods are lost through the slight or ordinary negligence of the carrier, the shipper can only recover the contract value; but that if the jury should find that the negligence was of such a character as to be called "gross," the shipper would be entitled to disregard his contract and recover what the goods are worth. These cases have firmly laid down the principle that no matter how the loss occurs, whether through negligence, —slight, ordinary or gross,—or otherwise, there shall be but one recovery, and that based on the contract valuation. *Adams Express Co.* v. *Croninger,* 226 U. S. 491; *Kansas Cy. R. R. Co.* v. *Carl,* 227 U. S. 639; *Mo. Kan. Ry. Co.* v. *Harriman,* 227 U. S. 657; *Wells Fargo & Co.* v. *Nieman-Marcus Co.,* 227 U. S. 469; *Chi. R. I. & P.* v. *Cramer,* 232 U. S. 490; *Boston & Maine Ry.* v. *Hooker,* 233 U. S. 97; *Pierce Co.* v. *Wells Fargo,* 236 U. S. 278; *Atchison S. F. Ry.* v. *Robinson,* 233 U. S. 173.

The doctrine established in the *Truitt* case, if adopted, would overthrow the well established law governing limited-liability contracts; it would give the shipper the power to secure the advantage of low rates by making a low valuation, and, in case of loss, give him the right to recover the full value of the goods, if the jury should decide that the negligence of the carrier which caused the loss, falls within that vague and indefinite field called "gross" negligence. The carrier's liability would be determined by a hair-splitting process.

The rule laid down by the Georgia Court seems to be but another attempt on the part of the state courts to evade the consequences of the CARMACK AMENDMENT. It is doubtful if this doctrine would be sustained by the United States Supreme Court. A. J. M.

LIABILITY OF COUNTY IN TORT FOR GOODS PURCHASED UNDER ILLEGAL CONTRACT.—In the recent case of *Hill County* v. *Shaw & Borden Co.,* 225 Fed. 475, the plaintiff, as a subcontractor for supplies furnished to the defendant County on an illegal contract, sued to recover for the same in an action against the County for conversion. It appears that the contract was entered into by a promisor, who was not a publisher of a newspaper having general